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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 931

STATE CORPORATION COMMISSION OF THE STATE OF KANSAS; William L. Mitchell, Chairman, John Woelk, and Harry G. Wiles, as members of said Commission, and Their Respective Successors in Office,
Petitioners,

vs.

BARTLETT AND COMPANY, GRAIN,
a Missouri Corporation,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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OPINION BELOW

The opinion of the Court of Appeals is reported 338 F.2d 495.

QUESTIONS PRESENTED

1. Are preliminary truck movements of grain from country elevators to a terminal elevator in the same state subject to state regulation of rates and operating authorities, when the shipper from the beginning has a fixed intention to reship all of the grain from the terminal elevator by rail or water to points in other states?

2. Did Congress in enacting the Motor Carrier Act, (Part II of the Interstate Commerce Act, 49 U.S.C., Sec. 301-327) preempt the field, so that state regulation of rates and operating authorities for any segment of an interstate shipment of agricultural products is precluded by the provisions of the federal act exempting shipments of these products from such regulation?

STATEMENT OF THE CASE

We adopt the following statement as contained in the opinion of the Court of Appeals (A1, 2):

> "[Petitioner], the State Corporation Commission of Kansas, is charged with the duty of administering the laws of Kansas relating to motor carriers. Kans. G.S. §66-139 (1949). The Commission is here attempting to assert jurisdiction over the [Respondent] by requiring it to comply with rates set by the Commission for truck shipments of grain within Kansas. This is an appeal from a judgment of the United States District Court for the District of Kansas which restrained and enjoined the appellant from exercising such jurisdiction.
>
> "The stipulation of the parties shows the facts to be as follows: The [Respondent], Bartlett and Company, Grain, is a Missouri corporation, licensed to do business in Kansas, engaged in warehousing and mer-

chandising grain. It operates 'country elevators' in Kansas near where grain is produced, and in addition operates an elevator known as River Rail Terminal Elevator at Kansas City, Kansas. This terminal elevator is equipped for receiving grain by rail and truck, and for shipping grain by truck, rail, and barge.

"All of the grain involved in this action is unprocessed wheat, corn, rye, barley, grain sorghums, and soybeans. It is purchased by the [Respondent] either at its country elevators or at other interior points in Kansas and transported by truck to River Rail also in Kansas. The trucks in which the grain is moved are neither owned nor operated by [Respondent], but are owned by various common, contract, and private carriers with whom [Respondent] negotiates individually.

"When the grain is delivered from the trucks at River Rail it is graded, tested, and deposited in a separate group of truck' bins, used only for such purpose. This trucked grain is held exclusively for resale to customers located outside Kansas. Later, after it is deposited in the bins, the grain is mixed and blended in order to maintain and improve its quality and to provide accurately classified grain to meet the specifications of [Respondent's] customers. During the harvest season truck shipments increase, but they take place during the entire year. The outbound shipments from River Rail proceed regularly throughout the year. While the [Respondent] may have outstanding contracts for grain of certain grade and quality, no truckload or shipment is obtained to fill any particular outstanding contract."

The pleadings contain the following admission (R. 2, 4):

". . . [Petitioners] have sought to impose upon the plaintiff . . . the scheme and program of regulation as prescribed by the laws of the State of Kansas. These laws provide that no common or contract carrier may transport grain for hire within the State of Kansas

without authority from the defendant Kansas Corporation Commission, and at rates prescribed and approved by that commission. . . ."

Kansas Statutes Annotated, Sec. 66-1116(d) (Pet. App. 11-12), provide that the Kansas statutes apply

". . . to all persons and motor vehicles engaged in interstate commerce only to the extent permitted by the constitution and laws of the United States. . . ."

Jurisdiction of the District Court was invoked not only under 28 U.S.C., §1331, as set out by petitioners (Pet. 3), but also under 28 U.S.C., Sec. 1337, on the ground that the case arises under the Motor Carrier Act, an Act of Congress regulating commerce.

The questions in this case, then, involve only federal law. Are the regulations of rates and operating authorities which the state seeks to enforce permitted by the Constitution and laws of the United States? Both of the courts below answered in the negative.

ARGUMENT

1. The lower courts correctly applied the controlling decisions of this Court in holding that a preliminary leg of a journey constitutes interstate commerce even though it is wholly within one state, if the shipper at all times intends reshipment to points in other states.

We will not say that a question of the permissible extent of state regulation under the Commerce Clause lacks importance. These petitioners, however, seek to relitigate a point which has been settled for more than fifty years by consistent holdings of this court.

The controlling decisions are *Railroad Commission* v. *Worthington*, 225 U.S. 101 (1912); *Texas and New Orleans Railroad Co.* v. *Sabine Tram Co.*, 227 U.S. 111 (1913) and *Railroad Commission* v. *Texas and Pacific Railway Company*, 229 U.S. 336 (1913). Each involved the precise question here in issue—that of the authority of a state to regulate rates and operating authorities of a preliminary intra-state leg of an interstate journey. In each it was held that state regulation was precluded by the commerce clause of the constitution. All were unanimous decisions. They have been cited literally dozens of times, and continue to be cited.

The rule of the cases is that the intent of the shipper at the time of commencement of the initial shipment is controlling. If this intention is to ship in interstate or foreign commerce, then the entire shipment is subject only to federal regulation and is free from state regulation of rates and authorities.

Under these decisions, it is of no significance: (a) that the precise interstate destination may not be known at the time the initial shipment begins; (b) that the product may be accumulated or stored at an intermediate point until orders can be obtained or shipping arranged; or (c) that contracts for resale may not be made until after the termination of the initial leg.

Operations at the intermediate point which are incidental to and in furtherance of commerce do not change the effect of the rule of the cases just cited. In *Chicago Board of Trade* v. *Olsen*, 262 U.S. 1 (1923), this Court held that the normal and usual activities of a terminal grain elevator, including ". . . storing, inspecting, weighing, grading or mixing and changing the ownership, consignee or destination . . ." (l. c. 33), do not take the grain out of commerce.

The operations at the intermediate terminal elevator in this case are the same as those described in the *Olsen* opinion.[1]

Since the decision of both lower courts is consistent with an unbroken line of authority, no need for further review is evident.

2. The Atlantic Coast Line Case is based on the express finding that interstate commerce had come to an end, and it is therefore clearly distinguishable.

The petitioners, just as in the Court of Appeals, place virtually their entire reliance on *Atlantic Coast Line Railroad Company* v. *Standard Oil Company*, 275 U.S. 257 (1927). That case is not in conflict with the cases cited in our first point, and, as a matter of fact, is quite consistent with them.

In *Atlantic Coast Line* sellers of petroleum products had caused them to be shipped by water from points in other states and foreign countries, to storage tanks owned by Standard Oil of Kentucky at coastal points in Florida. Kentucky Standard's entire business in that state (l.c. 267) consisted of the intra-state sale and distribution of these products. It owned the coastal tanks, bulk stations, and local service stations in the state, and made sales at wholesale and retail. It was simply a local merchant (even though a very large one), and this Court held, therefore, that interstate commerce had come to an end with the delivery to it at its coastal tanks.

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1. When the shipper intends interstate shipment from the inception, only a change in the nature of the article through a manufacturing process will have the effect of breaking the continuity of the interstate movement. *Arkadelphia Milling Co.* v. *St. Louis SW Ry. Co.*, 249 U.S. 134 (1919). This record shows nothing like that. Both the initial and the subsequent shipments consist simply of unmanufactured grain.

Subsequent rail shipments by Kentucky Standard to its bulk stations were therefore found to be intra-state shipments subject to state regulation. The decision turned not on the nature of the operations of the coastal terminal, but on the determination of the point at which interstate commerce ended.

There the initial seller-shippers had no intent at all except that of making delivery at the coastal storage tanks, at which point their duties ended with the passage of title to the local purchaser. Cases which turn on the intent of the shipper at the time of the first shipment would not govern a situation as to which that shipper had no concern or intent.

The *Atlantic Coast Line* opinion, by the same token, could have no application to a case such as this one, in which the Court of Appeals found a clear intent from the time of the initial shipment that the grain "ultimately be delivered to a buyer outside of Kansas. . . ."

The petitioners' assertion that there is no difference between a local leg at the beginning of an interstate movement, and an intra-state journey following delivery to the local consignee is at variance with the holding of this court in *Schechter* v. *United States,* 295 U.S. 495 (1935), decided in reliance on the *Atlantic Coast Line* opinion. There the Court found that interstate commerce in poultry had ceased following sale to a local processor. The opinion stated (l.c. 543):

> ". . . Hence, decisions which deal with a stream of interstate commerce—where goods come to rest within a state temporarily *and are later to go forward in interstate commerce* . . . are not applicable here. . ." (Emphasis supplied)

Even the *Schechter* opinion, with its narrow conception of the commerce clause, would recognize the shipments shown by this record as interstate commerce.

In *Standard Oil Company* v. *Federal Trade Commission*, 340 U.S. 231 (1951), an oil company transported gasoline by water from its refinery in Indiana to its storage tanks at Detroit, Michigan, from which it made deliveries to its local customers. Water shipments were not made "pursuant to orders already taken" (l.c. 237), but in a regular and continuous course in anticipation of the needs of customers. Stocks were accumulated for the winter season when navigation was restricted. This Court expressly distinguished the *Atlantic Coast Line* case and held that sales out of the storage tanks were "sales in interstate commerce," since the seller-shipper intended and initiated a regular and continuous course of interstate shipment.

This holding shows clearly that *Atlantic Coast Line* was not decided on any basis such as is suggested on page 4 of the petition and that the result would undoubtedly have been different if Kentucky Standard had been responsible for the initial water leg of the journey as well as for the subsequent rail trip. *Standard Oil* is much more like this case than is *Atlantic Coast Line*, since the same shipper was responsible for both segments of the journey.

The petitioners' suggestion that the Atlantic Coast Line decision impaired the authority of the *Worthington* case, *supra*, is not well taken. They rely only on a three-judge District Court opinion, in a case decided on another point, so that the comment is the purest dictum. That the authority of *Worthington* is unimpaired is shown by the following: (a) No opinion of this Court has ever

questioned *Worthington*, although it has been cited many times. It was relied on by Chief Justice Taft, the author of the *Atlantic Coast Line* opinion, in his later opinion in *Carson Petroleum Co.* v. *Vial*, 279 U.S. 95 (1929); (b) This Court denied certiorari (302 U.S. 747, 1937) in *Texas* v. *Anderson-Clayton Co.*, (5th Cir. 1937) 92 F.2d 104, which was found by both the District Court and the Court of Appeals to be virtually indistinguishable from the present case. We are mindful of the Court's caution about reading too much into the denial of certiorari, but it seems inconceivable that review would be refused if the lower courts had held state regulation invalid through reliance on cases which this Court considered no longer controlling or authoritative; (c) The opinions in the *Schechter* and *Standard Oil* cases, *supra*, show, moreover, that the *Atlantic Coast Line* case has a rather narrow application and that it made no change in the uniform course of the decisions.

There is simply no conflict between the opinion below and the *Atlantic Coast Line* case, so as to indicate further review by this Court.

3. The Petitioners have shown no reason for questioning the finding of both lower courts that state regulation is precluded by the Motor Carrier Act, 49 U.S.C., Sec. 301-327.

Petitioners complain: ". . . As the federal statutes do not attempt to regulate this activity, this important commerce is at present beyond the reach of any regulation." The trouble with this complaint is that Congress deliberately chose to free carriers of unmanufactured agricultural products from regulation as to rates and operating authorities, so as to preserve for producers the advantages of low-cost motor transportation. See *East Texas Motor Freight Lines* v. *Frozen Food Express*, 351 U. S. 49 (1956). The rates charged for the first leg of

trips of the type here dealt with manifestly affect interstate commerce. The regulation is purely in the interest of the carriers, and does not relate to the use of the highways or other matters of state concern.

Any state regulation of rates and authorities in this area would be at war with the firm Congressional policy of non-regulation. Both lower courts so found, and the issue is analyzed thoroughly in the opinion of the Court of Appeals (A5-A8).

A determination of federal preemption is itself sufficient to support the judgment. Petitioners cite nothing to show that the issue was not correctly decided. Under these circumstances further review would appear to be futile.

CONCLUSION

The judgment below is supported by: (1) the continued course of decision of this Court; (2) the explicit policy of Congress; and (3) sound conception of the purpose and scope of the Commerce Clause. The case out of which petitioners try to conjure a conflict is far wide of the mark.

Further review would serve no useful purpose and certiorari should be denied.

Respectfully submitted,

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